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89-1232
No. _____

Supreme Court, U.S.
FILED
JAN 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF COLORADO,
Petitioner,

vs.

CHARLES CLEBURN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984) - especially the holding that one is in custody for purposes of *Miranda* warnings *only* when his freedom of action has been curtailed to a degree associated with a formal arrest - apply only to routine traffic stops or does it define the "custody" element of "custodial interrogation" for purposes of giving *Miranda* warnings generally?

2. Is the "voluntariness" of consent to search the same mixed question of fact and law as the "voluntariness" of a confession, governed by the same requirement for some "coercive police activity" as a necessary predicate for suppression and the same "preponderance of the evidence" burden of proof?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF COLORADO,

Petitioner,

vs.

CHARLES CLEBURN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

OPINION BELOW

The opinion of the Colorado Supreme Court, *People v. Cleburn*, 88SA382 (Colo. November 20, 1989), is reported at 782 P.2d 784 and is reprinted as Appendix A.

A transcript of the findings of fact and conclusions of law of the district court is reprinted as Appendix B.

JURISDICTION

The jurisdiction of this court is invoked by writ of certiorari, pursuant to 28 U.S.C. sec. 1257 (1966), on the ground that the highest court of the state of Colorado has rendered a final judgment in which a right, privilege or immunity is specially set up or claimed under the Constitution

of the United States. The opinion of the Colorado Supreme Court resolving the interlocutory appeal below was issued on November 20, 1989. No petition for rehearing is permitted. *See* Colo. R. App. P. 4.1.

CONSTITUTIONAL PROVISIONS

1. U.S. Const. Amend. IV:
   The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
2. U.S. Const. Amend. V:
   No person shall be . . . compelled, in any criminal case, to be a witness against himself. . . .
3. U.S. Const. Amend. IVX, sec. 1:
   No state shall . . . deprive any person of life, liberty or property without due process of law. . . .

STATEMENT OF THE CASE

The defendant was charged and after a preliminary hearing was bound over for trial on one count of menacing by the use of a deadly weapon, Colo. Rev. Stat. 18-3-206 (1986), a class 5 felony. The trial court heard and granted the defendant's motion to suppress evidence, ordering suppression of a rifle and all statements given by the defendant to the arresting deputy sheriff at the defendant's home on the night he was arrested. The People filed an interlocutory appeal in the Colorado Supreme Court pursuant to Colo. Rev. Stat. 16-12-102(2) and Colo. R. App. P. 4.1, and it affirmed the suppression order.

After the suppression hearing, at which the arresting officer was the only witness, the trial court found that on September 7, 1988 Deputy Sheriff Alder of Fremont County spoke with someone who claimed to have been threatened and shot at and who gave a description of the defendant as the person who did it. Because the area was sparsely populated and the deputy was acquainted with the defendant, the court found that he knew who he was after. He and a posseman drove to the defendant's home while it was still daylight, and when the defendant answered his knock, the deputy said, "I need to talk to you." The defendant answered, "Come on in." The three men and the defendant's wife talked in the kitchen. The deputy asked the defendant, whom he called "Bo," if he had had a run-in with some kid, and when he admitted that he had, the deputy told him the youngster said there was a weapon and asked if he had used any sort of weapon. After the defendant's wife interjected that he had a BB gun, the deputy asked a number of questions about the defendant's other guns.

The defendant showed him some guns and allowed him to look in the closet at some others. When the deputy told him the victim mentioned a lever-action rifle and asked if he had anything like a .30-30, the defendant admitted he did, and although warned that he did not have to, he showed it to the deputy. When the deputy asked if he could look in the closet to see if there were any other guns, again telling the defendant that he did not have to let him, the defendant agreed to the inspection. Satisfied that there were no other guns in the closet, the deputy asked if he could take the .30-30 with him, and the defendant agreed. After thinking things over in his car, the deputy called the defendant back outside and arrested him.

Over the objection of the People, the trial court suppressed the rifle and statements of the defendant (one of

which was a question to the deputy asking what he would do if someone threatened his daughter) on grounds that although there was nothing bad in the demeanor of the officer or posseman (Appx. B, p. 40) and there were no threats or coercion in the traditional sense (Appx. B, p. 38), the friendship between the deputy and the defendant amounted to a subtle influence that rendered the consent and statements involuntary (Appx. B, p. 38). The court also found, apparently because it believed the deputy already had probable cause (or at least intended to arrest the defendant), that he was required to give *Miranda* warnings the moment the defendant opened the door (Appx. B, pp. 36 & 38), and therefore everything that followed was the product of an illegal custodial interrogation.

The Colorado Supreme Court, by a one vote margin and over a strong dissent, affirmed the suppression as a violation of *Miranda*, expressly holding that one is in custody for purposes of *Miranda* if a reasonable person would feel he was not free to leave, and finding that the evidence supported the trial court's finding that in the totality there was some deprivation of freedom (Appx. A, p. 18). The supreme court found no need to address the lower court's determination that the statements were involuntary, but did expressly find that in addition to the fact that it was the product of a *Miranda* violation, the rifle was properly suppressed because the subtle influence resulting from the friendship between the two men was sufficient to support the trial court's finding that the People had failed to prove the voluntariness of consent to search by clear and convincing evidence (Appx. A, pp. 20-21).

Although the Colorado Supreme Court's opinion makes reference to both the United States and Colorado Constitutions and to Colorado caselaw, its holdings are based on federal constitutional law. Colorado has never suggested that it has any separate, state-grounded *Miranda* doctrine, *see, e.g., People v. Hopkins*, 774 P.2d 853 (Colo. 1989) (reversing

and remanding for application of the "preponderance of the evidence" standard for waiver of *Miranda* rights announced in *Colorado v. Connelly*, 479 U.S. 157 (1986)); *see also Colorado v. Spring*, 479 U.S. 564 (1987)(reversing Colorado's holding that *Miranda* required notification of crime under investigation), or any separate voluntariness of consent to search doctrine, *see, e.g., People v. Helm*, 633 P.2d 1071, 1076 (Colo. 1981)(overruling prior Colorado interpretations that were in conflict with *Schneckloth v. Bustamante*, 412 U.S. 218 (1973)), and its holding in this case was clearly based on federal law. *See People v. Inman*, 765 P.2d 577, 578-9 (Colo. 1988)(in absence of clear statement that suppression ruling is grounded on state as opposed to federal constitutional law, Colorado Supreme Court will resolve case on basis of federal constitutional law). *See also Michigan v. Long*, 463 U.S. 1832 (1983).

REASONS FOR GRANTING THE WRIT

I.

Colorado's equation of "seizure" and "custody" conflicts with the decisions of this court but is a common misconception among the various jurisdictions resulting in the erroneous suppression of evidence.

This court should grant the writ and review the holding of the Colorado Supreme Court because it has construed the federal law requiring *Miranda* warnings in a way that directly conflicts with this court's decision in *Berkemer v. McCarty*, 468 U.S. 420 (1984), which significantly clarified the definition of "custodial interrogation" and substantially limited the application of the *Miranda* doctrine. Colorado's understanding of the federal law and its treatment of *Berkemer* are by no means unique or an aberration. Its holding is worthy of review by this court precisely because it is representative of the view of a

substantial number of jurisdictions in this country, creating a major split in the application of *Miranda*.

This case also presents a particularly good opportunity for review by certiorari because it does not involve any disputed questions of historical fact and because the procedural posture of the case (appeal from a pretrial suppression order) makes it extremely unlikely that the ultimate rule of decision could involve issues that are not already apparent.

The issues are in no way fact-specific but involve the articulation of legal standards that will necessarily have broad applicability and bring a substantial degree of needed uniformity to the application of the *Miranda* doctrine.

There has been considerable disagreement about when *Miranda* warnings must be given and how that determination should be made ever since the requirement was created. *See Maine v. Thibodeau*, 475 U.S. 1144 (1986)(Burger, C.J., dissenting from denial of cert.)(case "illustrates the acute need for clarification of the proper factors to be considered in making the 'in custody' determination"). *Miranda* itself said that interrogation is custodial if it occurs while the individual is "in custody at the station or otherwise deprived of his freedom of action in any significant way," *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), but the degree of interference with someone's freedom that would be considered "significant" remained unclear. A number of jurisdictions, including Colorado, answered this question by equating "seizure" for Fourth Amendment purposes with "custody" for Fifth Amendment purposes and simply applying the factors designed to determine whether someone had been "stopped," announced in *United States v. Mendenhall*, 446 U.S. 544 (1980), to the determination whether *Miranda* warnings are required. *See People v. Johnson*, 761 P.2d 958, 962 (Colo. 1983); *see also* Conner, Garnett and Loewi, *Miranda Rights in a Terry Stop:*

The Implications of People v. Johnson, 63 Den. U. L. Rev. 109 (1985).

In *Berkemer*, 468 U.S. at 440, this court relied on language from *California v. Beheler*, 463 U.S. 1121, 1125 (1983), which was itself an interpretation of the holding of *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977), to conclude that "the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" Although the specific holding of *Berkemer* was that *Miranda* warnings are not required in routine traffic stops, the broader significance of the holding was that it disassociated "custody" from "seizure" generally and expressly equated "custody" with "arrest," the higher level of Fourth Amendment "seizure," making clear that *Miranda* warnings are not required during investigatory stops based on articulable suspicion. As LaFave and Israel say, "Under *Berkemer*, the question is *not* whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with a formal arrest." 1 W. LaFave & J. Israel, *Criminal Procedure* sec. 6.6 at 75 (1989 Pocket Part).

Despite *Berkemer's* express refusal to apply *Miranda* differently to traffic stops, it is now clear that Colorado reads it as indicating nothing more than that routine traffic stops are a species of *Miranda's* exception for "[g]eneral on-the-scene questioning" and fails to appreciate the monumental significance of *Berkemer's* definition of "custody" for *Miranda* cases generally. *Compare People v. Cleburn* (not citing *Berkemer* or any Colorado case relying on it and instead relying on Colorado's pre-*Berkemer* cases equating "seizure" with "custody") *with People v. Archuleta*, 719 P.2d 1091 (Colo. 1986)(relying on *Berkemer* for proposition that roadside questioning of motorist detained pursuant to routine traffic stop is not necessarily custodial interrogation) *and People v.*

Wallace, 724 P.2d 670 (Colo. 1986)(relying on *Berkemer* for roadside questioning of motorist at accident scene) *and People v. Milhollin*, 751 P.2d 43 (Colo. 1988)(relying on *Berkemer* for general questioning at hospital after traffic accident). The breadth of Colorado's reading of *Berkemer* has always been doubtful because in each case in which it has applied the holding to routine traffic stops, it has also cited with approval pre-*Berkemer* cases expressly equating "custody" with "seizure," and because it has continued to rely on the "in any significant way" language of *Miranda,* without qualification, in non-traffic stop cases. *See, e.g., People v. Sandoval*, 736 P.2d 1201 (Colo. 1987).

Like Colorado, a number of jurisdictions continue to require *Miranda* warnings whenever a reasonable person would feel he was not free to leave and to narrowly read *Berkemer* as having merely created a "general on-the-scene investigation" exception for routine traffic stops. *See, e.g., People v. Bernasco*, 541 N.E.2d 774, 780 (Ill.App. 5 Dist. 1989)(test for custody is whether reasonable, innocent person would believe he was free to leave or expressly or impliedly bound to remain in presence of police); *State v. Fiocchi*, 553 A.2d 181, 186-7 (Conn.App. 1989)(struggling to find contact short of a stop believing any "seizure" under *Mendenhall* to be "custody" requiring *Miranda*); *Ruffin v. United States*, 524 A.2d 685, 699 (D.C.App. 1987) (same analysis for "in-custody" for 5th amend. purposes or has been "seized" for 4th amend. purposes); *State v. Seekon*, 392 N.W.2d 264 (Minn.App. 1986)(*Berkemer* emphasized routine traffic stop setting and cannot be extended to felony stop, initiated by radio report rather than personal observations). A number of federal circuits and state appellate courts, however, have accepted the broader reading of *Berkemer* and have changed their test for "custodial interrogation" accordingly. *See, e.g., United States v. Streifel*, 781 F.2d 953 (1st Cir. 1986)(analyzing *Berkemer* at length and remanding for

determination when, if at all, the stop ceased to be an investigatory detention and became an arrest, in order to tell which, if any, statements were made in violation of *Miranda*); *see also Blake v. State*, 763 P.2d 511 (Alaska App. 1988)(since *Berkemer* a person who has been "seized" is not necessarily entitled to *Miranda*); *State v. Little*, 421 N.W.2d 172, 173 (Iowa App. 1988)(custodial interrogation does not include investigatory questioning, basic identification questioning, or general on-the-scene questioning). There is a clear split in both the federal and state appellate courts about the meaning of what may be the most significant limitation on the requirement to give warnings before questioning since *Miranda* itself, and the nuances of misapplication are astonishing.

The importance of the split cannot be overstated. Increasingly, the constitutional significance of police dealings with other citizens has come to be analyzed in terms of contacts short of a stop, investigatory stops, and arrests, each involving a particular degree of intrusion and requiring a corresponding degree of suspicion. Just as police must know that a weapons pat-down is a proper incident of an investigatory stop based on articulable suspicion but that any more intrusive search is associated with probable cause and arrest, they must know whether *Miranda* warnings are required whenever a suspect is stopped, or only when the intrusion has reached the level of arrest.

Last term in *Pennsylvania v. Bruder*, 109 S.Ct. 205 (1988), this court reemphasized by summary reversal its *Berkemer* holding in the context of a routine traffic stop. The next step is to do so in a context completely removed from the traffic stop and clarify the relationship between "seizure" and "custody."

II.

Colorado's suppression of the defendant's rifle as the product of a search without voluntary consent conflicts with the decisions of this court concerning the determination of "voluntariness" under the due process clause.

It is also important that this court grant the writ because the Colorado Supreme Court has applied federal law governing consent searches which, by all indications, has been changed by this court's decisions concerning the voluntariness of confessions. Although most other jurisdictions, like Colorado, have failed to fully appreciate the relationship between these two areas of law, this court's decision in *Schneckloth v. Bustamante*, 412 U.S. 218 (1973), to adopt the "traditional definition of voluntariness" from the due process clause confession cases as the proper test for valid consent to search appears clearly to make the post-*Schneckloth* elaborations of or changes in the meaning of "voluntariness" in the confessions area equally applicable to consent searches. *See generally* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* sec. 8.2(e) at 21 (1990 Pocket Part).

The most important of these elaborations was this court's recent holding in *Colorado v. Connelly*, 479 U.S. 157 (1986), that absent "the crucial element of police overreaching, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process." "(C)oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Id., 479 U.S. at 167. The trial court below found that there was nothing bad in the demeanor of the officers, and their conduct was not threatening. Given the obvious forthrightness of the deputy's questions, there was never any suggestion of deception or subtle promises. The primary ground upon which suppression

was granted and upheld by the Colorado Supreme Court was that the friendship between the two men was an improper influence that rendered the defendant's consent involuntary. While this evidence should not have been sufficient to support a finding of "involuntariness" even before *Connelly*, *see, e.g., Commonwealth v. Willman*, 255 A.2d 534 (Penn. 1969)(friendliness alleviates danger of intimidation and is hardly police conduct leading to finding of involuntariness), it certainly cannot satisfy the requirement that there must be, as a necessary predicate to any finding of involuntariness, some "coercive police activity."

Although *Schneckloth* characterized the "voluntariness" of consent to search as a question of fact, subsequent elaboration in the voluntariness of confessions cases has distinguished the underlying determination of historical fact from the ultimate determination of "voluntariness," which is a mixed question of fact and law. *See Miller v. Fenton*, 474 U.S. 114 (1985). Even if the trial court were correct in finding that the defendant would not have given his consent but for the friendship between the two men, that kind of influence, as a matter of law, is not "coercive police activity" from which the defendant was protected by the Due Process Clause of the Fourteenth Amendment, and Colorado was wrong in deferring to the trial court's finding that it was.

Similarly the failure to appreciate that "voluntariness," whether of consent or confession, is the same due process consideration, led the Colorado court to impose an incorrect burden of proof on the prosecution. Colorado, along with a number of other states, has continued to treat the voluntariness of consent to search as a Fourth Amendment problem and to apply the "clear and convincing" burden of proof which it requires to prove that warrantless Fourth Amendment searches fall within a recognized exception to the warrant requirement. Since voluntary consent is not merely an exception to the

warrant requirement but rather makes the Fourth Amendment inapplicable altogether, and since the voluntariness of consent has been equated by this court with the voluntariness of a confession, which must be proved only by a preponderance of the evidence, *see Lego v. Twomey*, 404 U.S. 477 (1972), there does not appear to be any reason why the voluntariness of consent to search should not be governed by the same "preponderance" burden of proof. *See Colorado v. Connelly* (reaffirming the holding in *Lego v. Twomey*, 404 U.S. 477 (1972), and extending it to waiver of *Miranda* rights, indicating that the burden of proof at suppression hearings should be no greater than by a preponderance of the evidence); *see generally* 4 W. LaFave, *Search and Seizure* sec. 11.2(d) at 237 (2d ed. 1987)(acknowledging the practice in a number of states and suggesting its lack of support in federal law).

Preserving the ability of police to contact citizens and ask for their help in quickly allaying suspicions was an important factor in the development of the "consent to search" doctrine, *see Schneckloth v. Bustamante*, and it has become even more pivotal to the investigation of crime in the current environment. Since police have to make contact with a citizen and ask him at least one question to get his consent, doctrines developed independently under the Fourth, Fifth, and Fourteenth Amendments will always intersect in this process, and the failure of courts to understand the relationships among them and treat them as aspects of the same policy not only causes the unwarranted loss of reliable evidence but, more importantly, creates confusion, uncertainty, and cynicism in the law enforcement community. It would be difficult to find an example of a more forthright and less intrusive investigation than the one resulting in suppression of evidence here. If this conduct is unacceptable, how would we prefer that police behave?

CONCLUSION

For these reasons, the petition for certiorari should be granted and both issues should be reviewed by this court.

Respectfully submitted,

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APPENDIX A

SUPREME COURT, STATE OF COLORADO
NO. 88SA382

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

CHARLES CLEBURN,
Defendant-Appellant.

Interlocutory Appeal from District Court, Fremont County
Honorable Paul K. Keohane, Judge
EN BANC ORDER AFFIRMED
November 20, 1989
JUSTICE LOHR delivered the Opinion of the Court.
JUSTICE VOLLACK dissents; JUSTICE ROVIRA and JUSTICE MULLARKEY join in the dissent.

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No appearance for Defendant-Appellee

The prosecution has filed this interlocutory appeal pursuant to C.A.R. 4.1 challenging an order of the Fremont County District Court suppressing a rifle and statements made by the defendant to a deputy sheriff. The trial court concluded that the statements had been made during a custodial interrogation

without the required reading of Miranda[1] warnings and were involuntary. The trial court also ruled that the rifle had been seized after a warrantless search conducted without the voluntary consent of the defendant. We affirm the trial court's ruling and remand the case for further proceedings.

I.

The essential facts are not in dispute.[2] At approximately 5:00 p.m. on September 7, 1988, Deputy Sheriff Don Alder went to a location in western Fremont County to investigate a report that someone had menaced another person with a rifle and had fired the rifle at the victim. Alder spoke with the victim, who described the person who had menaced him. From the description, Alder determined that the defendant, Charles Cleburn, was a likely suspect. Alder, together with posseman Dan Ogden,[3] went to Cleburn's residence, which was in a sparsely populated area.

At approximately 7:00 p.m. Alder and Ogden arrived at Cleburn's house. Both were armed and dressed in uniforms. Alder was a previous acquaintance of Cleburn and the two

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[1]Miranda v. Arizona, 384 U.S. 436 (1966).

[2]The evidence was presented by a single witness, Fremont County Deputy Sheriff Don Alder, who was called by the prosecution. The following facts are taken from the trial court's ruling, supplemented to some extent by Alder's uncontradicted testimony.

[3]The record does not specifically disclose whether the "posseman" was a law enforcement officer. The trial court observed that the posseman was "the same thing" as a deputy sheriff. The prosecution has not taken issue with this, so we consider both Alder and Ogden to be law enforcement officers and sometimes refer to them both as deputies.

were on friendly terms. The trial court described what followed as "sort of a 'good ol' boy' scenario." Alder knocked at Cleburn's door, and told him that he needed to talk to him, and Cleburn told Alder and Ogden to "come on in." The three men, along with Cleburn's wife, spoke in Cleburn's kitchen. Alder addressed Cleburn by his nickname, "Bo," and asked if he had experienced a "run-in with a young kid" that afternoon. Cleburn said "yes." Alder said that the youngster had reported that "there was a weapon" and asked Cleburn if he had used any sort of a weapon. Cleburn's wife replied that Cleburn had a BB gun, and Cleburn pointed to such a gun leaning against a wall of the kitchen.

Alder then asked Cleburn a series of questions about any other guns he might own, inquiring first about a hunting rifle. Cleburn admitted owning a .270 rifle and went to his bedroom to get it. Alder followed Cleburn into his bedroom and Cleburn showed Alder the .270 rifle, which Cleburn had retrieved from a walk-in closet. Alder then told Cleburn that the victim had mentioned a lever-action rifle, and Alder asked Cleburn if he had "something like that, like a .30-.30." Cleburn admitted having such a gun. Alder asked if he could see it, but said "you don't have to let me." Cleburn showed him the rifle. Alder then asked if he could look in the closet to see if there were any other guns, again telling Cleburn that he did not have to let him. Cleburn agreed to the inspection, and the deputy examined the closet. Satisfied that there were no other guns in the closet, Alder asked if he could take the .30-30 with him, and Cleburn agreed.

Alder then returned to his car with the rifle and "got to thinking a little bit." Shortly thereafter he went back to Cleburn's door, asked Cleburn to come outside and placed him under arrest. Cleburn was subsequently charged in the District Court for Fremont County with one count of menacing by the

use of a deadly weapon, §18-3-206, 8B C.R.S. (1986), a class 5 felony.

In a pretrial ruling, the trial court granted a motion by the defendant to suppress the statements made by Cleburn to Alder prior to the formal arrest on the grounds that they were made during custodial interrogation without the benefit of a Miranda advisement and were involuntary. The trial court also suppressed the .30-30 rifle seized by Alder on the grounds that the rifle was discovered as a product of the illegal custodial interrogation and that Cleburn had not voluntarily consented to the search. The prosecution then brought this interlocutory appeal.

II.

First, we must consider whether Cleburn's statements should have been suppressed. An advisement of rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), is required before an individual in police custody may be subjected to interrogation by law enforcement officers. People v. Sandoval, 736 P.2d 1201, 1203 (Colo. 1987). In this case, as the trial court recognized and as the prosecution has conceded, there is no question that an interrogation took place and that no Miranda warnings were given. Our task is to decide whether the trial court was correct in ruling that the interrogation was custodial.

The test for whether a person is in police custody is "whether a reasonable person in the suspect's position would consider himself deprived of his freedom of action in any significant way." Sandoval, 736 P.2d at 1203. The fact that a person is interrogated in his own home does not make the interrogation noncustodial as a matter of law. Orozco v. Texas, 394 U.S. 324, 326-27 (1969). Application of the "reasonable person" test requires an objective assessment of whether a reasonable person in the defendant's circumstances would have believed that he was free to leave the officer's presence, and does not turn on the subjective beliefs of either the suspect or the law

enforcement officer. People v. Thiret, 685 P.2d 193, 201 (Colo. 1984). In making this determination, the trial court must consider the totality of circumstances surrounding the interrogation. Sandoval, 736 P.2d at 1203. Among the factors the court should consider are:

> [T]he time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

Thiret, 685 P.2d at 203.

The trial court made detailed findings regarding these factors and determined that "from the overall totality of the circumstances, there was [a deprivation of freedom]." In particular the trial court noted: (1) the presence of two armed law enforcement officers in the defendant's house for the purpose of talking to the defendant about a crime; (2) the fact that the deputy initiated the conversation; (3) the officer's purpose of obtaining evidence against the defendant; (4) the deputy's subtle coercive influence over the defendant as a friend; and (5) the relatively long twenty to thirty minute interrogation.

The determination of whether an interrogation is custodial -- whether a reasonable person would have believed that he was not free to leave -- is a factual determination to be made by the trial court. People v. Johnson, 671 P.2d 958, 962 (Colo. 1983). We will overturn a trial court's factual finding only if it

is not supported by competent evidence in the record. People v. Parks, 195 Colo. 344, 349, 579 P.2d 76, 79 (1978); People v. Ellis, 189 Colo. 242, 245, 539 P.2d 132, 135 (1975). Because we find the trial court's finding supported by the record, we affirm its order suppressing Cleburn's statements.[4]

III.

We next address the trial court's order suppressing the rifle seized at Cleburn's home. Warrantless searches or seizures are impermissible if they do not fall within one of the recognized exceptions to the warrant requirements of the United States and Colorado Constitutions. U.S. Const. amend IV; Colo. Const. art. II, § 7. One exception is a search to which the defendant consents. Thiret, 685 P.2d at 200-01. The prosecution argues that there was no search because Cleburn voluntarily revealed evidence of a crime.

This court has held that "[a] search consists of a looking for or seeking out that which is otherwise concealed from view." People v. Carlson, 677 P.2d 310, 316 (Colo. 1984). In this case the officers entered Cleburn's house seeking a .30-.30 rifle that was concealed from view in Cleburn's bedroom closet. Their actions clearly constituted a search. The question is whether Cleburn consented to that search and the subsequent seizure of the gun.

For consent to be valid it must be found to have been given freely and voluntarily in light of the totality of the circumstances. Thiret, 685 P.2d at 201. Voluntary consent cannot be "the result of duress or coercion, express or implied,

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[4]The trial court's order suppressing the statements is supported on the basis that they were obtained by custodial interrogation without the benefit of Miranda warnings. Therefore, we need not consider whether the court correctly concluded that the statements were also involuntary.

or any other form of undue influence exercised against the defendant." Id. In determining whether consent has been voluntarily given, the trial court should consider the defendant's age, education, intelligence and state of mind as well as the duration, location and other circumstances of the search. Carlson, 677 P.2d at 318. Knowledge of the right to refuse permission to conduct a search is also a relevant factor although "not a prerequisite to establishing the voluntary character of a consent search." Id.; People v. Helm, 633 P.2d 1071, 1076 (Colo. 1981). The burden is on the People to show by clear and convincing evidence that consent was voluntary. People v. Carlson, 677 P.2d 310, 318 (1984); Helm, 633 P.2d at 1077 n.,8; People v. Lowe, 616 P.2d 118, 124 (Colo. 1980).

When consent is given after an interrogation in violation of Miranda, the consent is likely to be constitutionally infirm, tainted by the unconstitutional interrogation. See Lowe, 616 P.2d at 124 (suppressing items obtained in search because search and consent to search were fruits of unlawful custodial interrogation); cf. People v. Donald, 637 P.2d 392, 394 (Colo. 1981) (consent to search apartment would likely be infirm as product of illegal entry); Wong Sun v. United States, 371 U.S. 471 (1963)(suppressing statements made incident to an unlawful arrest and subsequently seized narcotics as "fruits" of unlawful action). Because the defendant had already admitted owning the rifle and being involved in a "run-in" with the victim, he had nothing to lose by giving Alder the rifle. These circumstances support the trial court's determination that the rifle was obtained as a result of the illegal custodial interrogation.

The trial court also held that the People had not met their burden of establishing the voluntariness of the consent by clear and convincing evidence. The trial court noted that the questioning began at 7:00 p.m., there were two armed deputies in the defendant's home, the prior relationship between one of

the deputies and the defendant made the questioning subtly coercive, the defendant was in custody, and the defendant had already made incriminating statements without the benefit of a Miranda advisement.

Voluntariness is a question of fact. People v. Carlson, 677 P.2d 310, 318 (Colo. 1984). A trial court's finding, therefore, must not be overturned if the record contains competent evidence supporting it. People v. Cummings, 706 P.2d 766, 769 (Colo. 1985); People v. Medina, 180 Colo. 56, 58, 501 P.2d 1332, 1332 (1972). Because we find the trial court's ruling supported by the record, we affirm the order suppressing the rifle seized at the defendant's home.

IV.

In summary, we affirm the trial court's order suppressing statements made by the defendant and the rifle seized at his home. The case is remanded for further proceedings consistent with this opinion.

JUSTICE VOLLACK dissents; JUSTICE ROVIRA and JUSTICE MULLARKEY join in the dissent.

JUSTICE VOLLACK dissenting:

The majority concludes that Deputy Sheriff Don Alder (Alder) was required to advise the defendant Charles Cleburn (defendant) of his Miranda[1] rights prior to questioning the defendant in his home because the setting was custodial.

I disagree with the majority affirmance of the trial court's finding that the questioning of the defendant in the kitchen of his home took place in a custodial setting. I believe, as we have previously held, that "the trial court's ultimate constitutional ruling cannot be squared with the court's

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[1]Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

evidentiary finding of fact." People v. Quezada, 731 P.2d 730, 734 (Colo. 1987).

I.

The evidence from which the trial court made its findings was uncontradicted and reflects the following events. Alder was assigned on September 7, 1988, to investigate a report that someone menaced a young man. The incident took place in sparsely populated Colorado Acres in Western Fremont County. Alder interviewed the victim, who gave him a description of an older person. The victim's description matched the defendant. Alder and posseman Dan Ogden[2] contacted the defendant at his home that evening. Alder advised the defendant that he needed to talk to him, whereupon the defendant invited Alder and Ogden into the kitchen. Alder ask the defendant, in the presence of Ogden and the defendant's wife, if he had had a run-in with a young

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[2]Alder testified that both he and Ogden were in uniform and both were armed when they went to the defendant's house. Alder also testified as follows:

> Q: What did you--know did you make contact with him?
>
> A: I walked up to his house and knocked on the door.
>
> Q: And what happened then?
>
> A: I went and asked him--I told him that I needed to talk to him. He told me to come on in, and so we went into his kitchen.

kid that afternoon after school, to which the defendant replied "Yes."[3]

Alder advised the defendant that the young kid said that there had been a weapon, and Alder asked the defendant if he used any sort of a weapon. The defendant's wife responded that the defendant had a BB gun. Alder asked the defendant if he had any hunting rifles. The defendant acknowledged he had hunting rifles and shotguns. Alder and the defendant conversed in normal, calm tones and neither one made demands or threats on the other. Alder asked the defendant about his rifle collection.[4] Alder then advised the defendant

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[3]Alder testified as follows:

Q: Okay. What did you say to him at that time?

A: I told him--I asked him if he had a run in with a young kid that afternoon, that evening, after school.

Q: What did Mr. Cleburn respond to that?

A: He said, "Yes", he had.

Q: And how did you ask the question?

A: That's basically the way I did it. I was just standing there, and I said--I called him Bo. I said, "Did you have a run in with a young kid this afternoon?" I wasn't pushy or anything; loud.

[4]Alder testified as follows:

Q: Did you ask anything else? Was there any further conversation between you and the

Defendant at that time?

A: At that time, I asked him--I says [sic], "Do you have any rifles? Any hunting rifles?" And he said, "Yes." He says [sic], "I have a .270." And so I went and asked him, "Would it be all right if I looked at it?" And he said, "Yes."

Q: At that time, what did Mr. Cleburn do?

A: He got up out of the chair and started walking to the bedroom. Actually, we walked through the living room. And he got up and started walking that way.

Q: What did you do?

A: I went and asked him--I said, "Would it be all right if I come with you?"

Q: Why did you ask that question?

A: Well, two reasons: The first one was, I want to see what he was actually going to do and--but he was going in to mess with gun [sic], and I didn't like that; somebody going in to another room and coming back with a gun.

Q: What was your demeanor at this time?

. . . .

A: . . . . I seen [sic] him move a gun in

that the young man described the weapon as a lever-action .30-.30, and inquired whether the defendant had such a gun. Alder prefaced his request to look at the defendant's lever-action rifle with the statement "[y]ou don't have to let me."[5]

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a scabbard to pick up another gun. And so he brought me the--he handed it out and come walking around behind the door then and said, "Here it is." So I asked him, I said, "Is it all right to take it out of this here and take a look at it?" And he said, "Sure." And so I took it out and looked at it, and I checked and see [sic] if it was unloaded because I didn't want it laying around.

[5]Alder testified as follows:

Q: Did you ask any further questions at that time?

A: Yeah. I asked him--I says [sic], "Well, the young kid had told me that there was a lever action rifle." And I says [sic], "Do you have something like that, like a .30-30?" I says [sic], "Would it be all right if I looked?" I says [sic], "You don't have to let me." And he says--"Well," he says, "I do have a lever action .30-30."

. . . .

A: Okay. Then I went and--I asked him, I says [sic], "Is this all?" I says [sic],

After the defendant produced the .30-.30, Alder asked if he could take the rifle with him, and the defendant agreed.

Alder left the house, went to his car, and concluded that he should take the defendant into custody. Alder returned to the house, asked the defendant to step outside, and placed him under arrest.

II.

A police officer is required to issue a Miranda warning when he subjects a person to interrogation in a custodial setting. There must be both custody and interrogation before Miranda warnings are required. People v. Milhollin, 751 P.2d 42, 49 (Colo. 1988). The test for determining if a person is in custody, or in a custodial setting, is whether a reasonable person in the suspect's position would consider himself deprived of his freedom in a significant way. Id.

In Oregon v. Mathiason, 429 U.S. 492 (1976), a state police officer called the defendant and asked if he could meet with him to "discuss something." Id. at 493. The defendant agreed

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> "Could I take another look in your--back in here and see if you have any more rifles?" You know, "I don't have to--I mean, you don't have to let me in there if you don't want to." And he said, "No, you can come back and look." . . . .
>
> . . . .
>
> A: Okay. Then I said, "This here--the young kid said that it was a lever action that was shot at him." I said, "Would it be all right if I take this with me to take it and investigate it?" And he said, "Yes."

to meet with the officer at the state patrol office. When they met at the office, the officer and the defendant sat across a desk in a closed room and the officer told the defendant that he was not under arrest. The officer then told the defendant that he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The defendant then admitted taking the property. The Supreme Court held that there was "no indication that the questioning took place in a context where [defendant's] freedom to depart was restricted in any way." Id. at 495. The Court stated that the defendant "came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2 hour interview [the defendant] did in fact leave the police station without hinderance." Id. (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)); cf. Orzco v. Texas, 394 U.S. 324 (1968)(defendant questioned by police in his own bed found to be under custodial interrogation where testimony of police officers was that the defendant was under arrest and not free to leave).

In People v. Thiret, 685 P.2d 193, 203 (Colo. 1984), we reversed the trial court's order suppressing statements made by the defendant during a conversation he had with an investigator from the district attorney's office. The trial court suppressed the defendant's statements because the investigator did not readvise the defendant of his Miranda rights. The facts of the case, however, demonstrated that the defendant entered the investigator's office and began conversing with him voluntarily. Id. The polygraph examiner placed the defendant in the investigator's office while the defendant waited for a ride home. Id. The polygraph examiner placed the defendant in the investigator's office while the defendant waited for a ride home. Id. at 198. The defendant was not under arrest when he was in the investigator's office, and during the defendant's conversation with the investigator another officer interrupted

and asked the defendant to let him know when he was ready to leave. Id. at 198. We held that the record was "devoid of any evidence to support the district court's determination that the defendant was 'in custody' at the time of the . . . interview." Id. at 203. In People v. Milhollin, 751 P.2d at 49, we reached a similar conclusion. In Milhollin the defendant was riding a motorcycle when he became involved in an accident with a car. An officer investigating the accident found the defendant in a hospital awaiting surgery. Without advising the defendant of his Miranda rights, the officer asked the defendant if he was the rider of the motorcycle. The defendant responded that he was. We reversed the trial court order suppressing the defendant's statement that he was the rider of the motorcycle because we concluded that the defendant was not in a custodial setting. Id. at 50-51. We stated that there was "no evidence in the record to support the conclusion that the defendant, at the time he was asked whether he was the driver of the [motorcycle], reasonably believed that his freedom of action had been curtailed by the officer to a degree associated with a formal arrest." Id. at 52.

Mathiason, Thiret, and Milhollin dictate a result different from the one reached by the majority. Alder and Ogden visited the defendant at his home. When the defendant answered the door Alder did not ask if he could come in, but the defendant invited him in. Alder and his companion were in uniform, see Milhollin, 751 P.2d at 45, and Alder immediately asked the defendant if he had been involved in an incident with a young kid earlier that day. The defendant answered Alder's questions. When Alder asked the defendant if he owned a lever-action rifle like the one described by the victim, the defendant answered that he did. Alder then asked if he could see the gun, but reminded the defendant that he did not have to produce it. The defendant, however, produced the gun and let Alder take it with him. Under these

circumstances, a reasonable person would have felt free at any time to end the conversation, ask Alder to leave, or leave himself. The situation was clearly distinguishable from an arrest. Milhollin, 751 P.2d at 52.

The trial court found that the defendant was in custody because Alder used the defendant's friendship with him to subtly coerce the defendant into revealing incriminating information[6] based on a subjective test of Alder's friendship and not on objective evidence of whether a reasonable person in the defendant's position would consider himself deprived of his freedom in a significant way. I would hold as a matter of

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[6]The trial court held that:

> The court would find that from all of the facts present, the Defendant was in fact in custody; although there had been no technical arrest. All of the facts, looking at the objective standards, leads a reasonable person to believe that he was in custody in fact. And then we have that subtle coercion, too. It's not the threatening type of thing, but it is the use of a relationship by the Deputy. Whether he did it consciously or unconsciously, maybe, is immaterial. But the effect upon the Defendant that, you know, this is a friend who has come to help me; that type of thing. Where he had not been advised at all that a particular item was being sought for a specific criminal prosecution, and the Deputy knew all of this. He knew he was looking for a .30-30. He knew the Defendant was the one who was alleged to have pointed it prior to that at a victim.

law that the trial court's ultimate constitutional ruling cannot be supported by the trial court's evidentiary findings of fact.

III.

I disagree with the majority's conclusion that the trial court properly suppressed the lever-action rifle seized at the defendant's home. In my opinion the defendant voluntarily consented to Alder's seizure of the rifle.

The issue is whether, in light of the totality of the circumstances, the defendant's consent was freely and voluntarily given. Thiret, 685 P.2d at 201. The trial court concluded that the defendant did not voluntarily consent to the search and seizure because Alder used subtle coercion to obtain the defendant's consent,[7] and the defendant's consent was derived from Alder's exploitation of his failure to advise the defendant of his Miranda rights. I do not agree with the trial court's second reason because, in my view, there was no Miranda violation. See part II, above.

I also believe that the trial court erred in concluding that, on the basis of Alder's use of subtle coercion, the defendant's consent was not voluntary. There is no testimony in the record to support the trial court's conclusion that Alder used the defendant's friendship with him to coerce the defendant to involuntarily consent to the search. The testimony in the

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[7]The trial court found that

> [a]s far as the consent is concerned, that goes under the totality [of the circumstances], too. It goes back to the friendship type of thing. The questioning was based upon that. And in the Court's opinion and finding, it implied subtly the relationship, and the consent flowed from that, and the same thing took place.

record only supports the conclusion that the defendant and Alder were acquainted and were on good terms. Not every interaction between law enforcement officials and citizens who are acquainted produces an atmosphere of coercive pressure. See People v. Nisser, 189 Colo. 471, 542 P.2d 84 (1975)(no unreasonable search where undercover agent who is personally acquainted with defendant gains entry to defendant's residence by invitation and observes or is handed contraband). In this case there was no evidence to support the trial court's conclusion that Alder used his acquaintance with the defendant in a coercive manner.

Alder's manner indicates that he did not coerce the defendant into consenting to the search. Alder did not ask to simply "look around" before searching the defendant's closet. Cf. Thiret, 685 P.2d at 200 (defendant's oral consent to "look around" was not a consent to search). Alder told the defendant that the victim described the weapon as a lever-action rifle. Before the defendant produced the .30-.30, Alder reminded him that he did not have to show him the rifle. Despite this warning the defendant voluntarily produced the rifle.

People v. Bowman, 669 P.2d 1369 (Colo. 1983), involved an investigation of a suspicious fire by an investigator from the Aurora Fire Department. The investigator questioned the defendant after the defendant had left the scene of the fire. The investigator asked the defendant if he could see the pair of pants the defendant was wearing at the scene of the fire. Id. at 1377. The defendant consented and handed a burned pair of pants to the investigator. Id. at 1377-78. When the investigator observed the burn spots he asked the defendant if he could have the pants, and the defendant replied, "Yes." Id. at 1378. We noted that, "while the defendant's knowledge of his right to withhold consent is a factor to be considered, an advisement of this right is not a condition to a finding of

voluntary consent." Id. at 1377. We held that "the evidence support[ed] the ruling of the trial court that, under the totality of the circumstances, [the defendant] voluntarily consented to relinquish the burned pants to the fire investigator." Id. at 1378. We also noted that

> [a]s in People v. Elkhatib, . . . "there was no evidence of coercion, either in the form of an officer's claim of lawful authority to search regardless of the defendant's permission, or a threat or subtle promise calculated to flaw the defendant's judgment. . . . Nor is there any evidence of deception as to the officer's stated purpose" in examining the pants.

Id. (quoting People v. Elkhatib, 632 P.2d 275, 278 (Colo. 1981)).

The same analysis applies in this case. There is no evidence that Alder used his acquaintance or friendship with the defendant to "subtly coerce" the defendant into producing the rifle. Alder did not deceive the defendant or make any subtle promises, hints or suggestions. Under the totality of the circumstances the defendant voluntarily consented to the search and seizure.

I am authorized to say that JUSTICE ROVIRA and JUSTICE MULLARKEY join in this dissent.

APPENDIX B

District Court, Fremont County, State of Colorado
Case No. 88CR159, Court Division II

REPORTER'S TRANSCRIPT [MOTION TO SUPPRESS]

The People of the State of Colorado,
vs.
Charles A. Cleburn,
Defendant.

This matter came on for hearing on October 20, 1988, before the HONORABLE PAUL J. KEOHANE, District Judge in and for the County of Fremont, State of Colorado.

. . . .

As far as the consent is concerned, the Court -- well, the Court should make findings of fact for the record for appeal anyway. So I will do that. The Court will make the following findings of fact: That on September 7th, 1988, Deputy Sheriff Alder was dispatched to investigate this incident, and the incident upon which a charge of menacing, a Class 5 felony, was subsequently filed alleging that the incident took place on September 7th, 1988, by use of a deadly weapon, a rifle; that the officer, Deputy, talked to the victim at the Country Store which is in Fremont County and got the victim's version of the case of what had happened; and, basically, he was told that an individual -- an older person, gray hair, et cetera -- a person matching the description of Mr. Cleburn had menaced him, basically; that the victim had come around some corner on a road, a country dirt road, and there was this person with his foot up on brush or wood or something and holding a rifle and he fired the rifle at him. Deputy Alder went to a particular

location. It's sparsely populated; just a couple, not many people living there. And the Court would find that from all the evidence, he knew who he was looking for. It was the Defendant. He's a little ambivalent about that, but I don't have any question in mind. He knew who he was going after and where. In fact, he knew the person from prior acquaintances. And, in fact, Mr. Alder had been there--the Deputy had been there when the Defendant was building his house. They were on a friendly basis as far as any acquaintanceship is concerned; that he went to the Defendant's house; ID'd the Defendant. It was about seven p.m. at night. He states that there was not evidence of any drug or alcohol use regarding the Defendant. He was not under the influence. It appears to be sort of a "good ol' boy" scenario. He knocked on the door, stated, "I need to talk to you." The Defendant said, "Come on in." They went into the kitchen. The terminology of some kind of nickname was used, "Bo", which the Defendant is apparently known by, which indicates to the Court, you know, a little closer relationship, and the court will make that finding. He was asked if he had a run-in with some kid by Deputy Alder; and that present in the kitchen were the Defendant, the Defendant's wife, the witness Deputy Alder, and the Deputy Posseman. The posseman and Alder were both in uniform and armed. An interrogation did take place. As far as that factor, there is no question about that.

The question is, was it custodial? He was asked if he used a weapon. The wife then intervened and said a BB gun. The Defendant pointed at the BB gun. He was asked then if he had any rifles, and he said, "Yes, I have a .270." And the officer said, "Okay if I look at it?" And the Defendant said, "yes." The Defendant headed to the bedroom. The Deputy said, "Can I go with you?" because of the fact that he was going to get a weapon. That seems pretty sensible. They went in there. "Can I see it?" said the Deputy. The Defendant

said, "Yes." The witness checked out the weapon and laid it on the bed. "Any more guns or weapons?" The Defendant first said "No" and then hesitated and then said, "Yes, shotguns." "Can I look at them?" said the Deputy "Yes, sure", said the Defendant. "I've got a .22 also." That was laid on the bed. He was asked if he had a lever action .30-30 rifle. The Deputy said, "Can I look? You don't have to let me." The Defendant said, "Okay." And he got out a .30-30, which apparently was not in a scabbard. That was handed to the Deputy. And, again, the second time, the statement was made--you've already got the .30-30. And then you say, "You don't have to let me, but I would like to look to see if there's some more." And the Defendant says, "Okay." Now, at this point and time, you've already got the .30-30. So that's not very helpful as far as some kind of consent. So if you got consent here, you're going to have to base it on the Court's interpretation, I think, of the facts and the one statement that was made by Alder that said, "Can I look? You don't have to let me." The consent has got to be based on that and inferences, I guess. "Can I take this .30-30?" And the Defendant said, "Yes."

Then later--it's shortly thereafter--the Deputy goes to the car and decides he is going to arrest him; in his words, in his thinking. And then he goes and places him--asks him to come outside, the Defendant, and places him under arrest. There are no threats, promises, coercion in the true sense of the word as far as what one would usually be looking for. But the Court does find that in the circumstances present, this is sort of a subtle situation here where you have a relationship between two parties, and they know each others. And I think, under the circumstances, the policeman used that to his advantage, subtly. And I think, without that, he may not have been given permission to do any of the things he did. Had it been some deputy that the Defendant didn't know, I don't

think these things would have happened. I think he used that influence. That influence aided him in not only getting the statements but also getting into the house, into the closet and into the guns. In twenty to thirty minutes, this all took place and it took place at the Defendant's home. Now, that raises, I guess, two things: The fact that it took place in his home. In the People's favor, the guy is in his own place. So the Defendant is sitting in his own home. So if you're going to be at ease anywhere, you're in your own house, and you're not at a police station. So that would be favorable to the District Attorney's case. But, on the other hand, it's seven p.m. at night, and you have two armed people coming into the house, and I don't appreciate that very much. I think that weighs in the Defendant's favor. So it works both ways.

The statements made by the Defendant of "What would you have done if somebody treated your daughter that way?" or something like that, which is not too good of a statement that was made. That is one of the statements that I assume the People want to use.

On cross-examination, it was brought out that the witness Alder, the arresting officer, had all the information, had all the details; was pretty sure who the suspect was. I think it goes further than that. I think he knew who the suspect was. The Court will make that finding. If there was any doubt at all in his mind, that doubt was removed completely when the door was answered at the house by the Defendant. There was no Miranda advisement till later. There was not written consent. There was no explanation of the rights regarding the consent to search except for a bare statement that the officer made before he got the .30-30; that it was basically as follows: "Can I look? You don't have to let me." To which the Defendant said, "Okay".

As far as the search is concerned, the Court would find it should apply the totality test and determine whether it was

voluntarily given and apply certain presumptions. There is a presumption that a search without a warrant violates the constitutional rights of the Defendant. And to see if it's a voluntary search, to overcome that presumption, the Court should determine it by the totality of the circumstances, including whether the Defendant is in custody, or whether any coercion is present. The Court would find that from all of the facts present, the Defendant was in fact in custody; although there had been no technical arrest. All of the facts, looking at the objective standards, leads a reasonable person to believe that he was in custody in fact. And then we have that subtle coercion, too. It's not the threatening type of thing, but it is the use of a relationship by the Deputy. Whether he did it consciously or unconsciously, maybe, is immaterial. But the effect upon the Defendant that, you know, this is a friend who has come to help me; that type of thing. Where he had not been advised at all that a particular item was being sought for a specific criminal prosecution, and the Deputy knew all of this. He knew he was looking for a .30-30. He knew the Defendant was the one who was alleged to have pointed it prior to that at a victim.

The burden of proof is upon the People to show by clear and convincing evidence that the search falls within a recognized exception to the warrant requirements; that the consent was freely and voluntarily given; not the result of duress, coercion either explicit or implicit.

If there's disputed evidence regarding voluntariness, then it's up to the province of the Court--it's up to the Court as a fact finder to weigh the credibility of the witnesses and resolve that credibility in light of all the circumstances.

I'm not placing--I'm sure the officer is a good man--Mr. Alder--and all that. But I don't give an awful lot of credibility to his testimony at least upon the proceedings he followed. I think they're pretty poor.

A consent that is otherwise validly given is not rendered invalid because of a lack of a Miranda advisement. That's one of the things you look at. Again, a Miranda advisement was not given here. Where defendant's consent follows a Miranda violation, however, the Court must consider if a consent was derived from an exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. These things are so closely connected. They are too closely connected. I believe that the Miranda advisement should have been given at the very latest when the door was answered and verified the officer's ID question, if he had any. I don't think he had any. But if he did, it was satisfied when the door was answered.

Knowledge of the defendant of his right to refuse is not a prerequisite of a voluntary consent. He doesn't necessarily have to know that, but I think it has to know more than what was given to him here.

As far as the consent is concerned, that goes under the totality, too. It goes back to the friendship type of thing. The questioning was based upon that. And in the Court's opinion and finding, it implied subtly the relationship, and the consent flowed from that, and the same thing took place.

I don't think the People, then, have met their burden of a voluntary consent. Clear and convincing is the test without a warrant. And when you look at all the circumstances--again, seven o'clock at night at the man's house with two armed deputies; a Deputy and a posseman--it's the same thing. And it doesn't stand up to what my constitutional scrutiny would require, for sure.

The other cases that I think are important here deal with the statements. And I'll go back over that. At least two of them were mentioned by Mr. Barta. We have People v. Johnson, 671 P.2d 958, a 1983 Colorado Supreme Court case. It has a pretty good recitation of the law. The cop in that case had a

hunch that the defendant committed a burglary and some additional facts that would negate the defendant in the case; either as a witness or a suspect. So he goes to the defendant's place of employment and gets him outside and asked him certain questions. The policeman in that case said that the defendant was somewhere between a witness and a suspect. Well, in this case before us, Cleburn, there's no question but he was a suspect, the suspect. The policeman in Johnson said he didn't feel he had probable cause to arrest. In our case, he did. And any reasonable officer would have known that; and if he had any doubt in his mind at all, that doubt was resolved when he knocked on the door and the door was answered by this Defendant. The cop said that the defendant was not free to leave in Johnson after he had confessed. But he was free to leave before he made his statement. And the Court would find in the case before us, Cleburn, that based upon the totality of the circumstances that Mr. Cleburn was not free to leave until everything was done; the questioning and the search. The defendant in Johnson said he felt he was not free to leave. Well, the Defendant didn't testify here, but I am making that inference based upon all the facts before me Johnson sets forth all of the factors as to whether somebody is in custody or not; and it talks about the time of day, the place. The time of day is seven p.m. It doesn't really weigh a lot either way. But it was towards night. But it's September, so it's probably light.

The place? As I said before, that could fall either way.

The length of the interrogation? This took twenty, thirty minutes. That's in the Defendant's favor. You've got questioning. You've got going into the bedroom. You've got gun after gun coming out. Twenty, thirty minutes is relatively long.

The purpose of the interrogation? There's no question about it what the purpose was. This particular defendant, words used

by the policeman; nothing threatening, no coercion, but the subtlety again. And he allowed a friendship situation to overcome what I consider to be the voluntary freedom of choice the Defendant had. It certainly had something to do with it.

The demeanor of the policeman? There's nothing bad there.

Persons present? Two armed deputies in the man's house.

Was there an arrest after the interrogation? That's a factor. There was in fact an arrest. An arrest took place after the interrogation and the search. You've got to look at all those things.

And the other case you mentioned, which is also one of the later pronouncements and right on point, is Thiret, 685 P.2d 193. Custodial interrogation. What do you do to figure out if it is? Well, who initiated the conversation or interrogation? The Court would find here the policeman. There's no way you can say that this Defendant was voluntarily answering the questions or initiated the conversation. Deputy Alder initiated all the questioning.

Was there any deprivation of freedom? I think from the overall totality of the circumstances, there was.

In measuring the totality in Thiret, they mention the following factors. Again, it's pretty close to Johnson. The time, the place, the persons present, the length, the need of the interrogation. Was there any limitation on movement or any other formal restraints placed upon the defendant during the interrogation? Not explicitly here, but impliedly yes. Any directions given to the defendant? Here, I think yes; because as part of the interrogation, all of a sudden "Where are your guns? Let's go get them." That type of thing.

For all of those reasons, I thing the totality does support the motion. And the Court would specifically find that the statements were taken in violation of his rights. The consent search is invalid. The People have not met their burden. That

even if--this is an alternate finding. That even if some appellate court would hold the statements admissible, the consent to search is not; separate and a part. They do go together, but even separate and a part.

Is there anything else before the Court?

The motion is going to be granted.

Supreme Court, U.S.
FILED
FEB 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1232

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October Term, 1989

THE STATE OF COLORADO,

Petitioner,

vs.

CHARLES CLEBURN,

Respondent.

BRIEF OF THE COLORADO ATTORNEY GENERAL AND THE TWENTY-ONE STATES THAT APPEAR ON THE INSIDE COVER AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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ISSUES PRESENTED

1. Whether a citizen-police encounter can ever amount to "custody" requiring *Miranda* warnings if it is not so intrusive as to elevate an investigatory detention to an arrest?

2. Whether the same, or a different, analysis applies to voluntariness determinations concerning statements and consents to search?

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Pursuant to Rule 37 of the rules of this Court, the Colorado Attorney General and the amici states by their Attorneys General respectfully submit this Brief as *amici curiae* in support of the petitioner here.

STATEMENT OF THE CASE

The respondent here was charged with felony menacing in Fremont County, Colorado. On interlocutory appeal by the local district attorney, the Colorado Supreme Court upheld the suppression of some statements and a rifle respondent gave to

local sheriff's officers.

A deputy sheriff suspected an acquaintance, the respondent, of having menaced another individual with a gun. Consequently, he and a local posseman went to respondent's house and told him they needed to talk to him. Respondent invited them inside. The men talked in "sort of a 'good ol' boy scenario" in the kitchen in the presence of respondent's wife. The deputy asked respondent whether he had earlier that day had a "run-in" with another man, to which he answered he had. The deputy informed him that the victim claimed a weapon had been involved and asked a series of questions about what types of weapons respondent possessed. Respondent went to his bedroom to get a gun. The deputy followed and asked him about other guns as well.

The deputy eventually asked respondent whether he had something "like a .30-30"; respondent answered he did. Respondent produced the rifle and gave it to the deputy, after having been informed he need neither show it or give it up. The deputy took the rifle to his car, and, after some reflection, returned to place respondent under arrest.

The Colorado Supreme Court held respondent's statements inadmissible, since, in its view, he was subjected to custodial interrogation without having been advised of his *Miranda* rights. Specifically, it found that a custodial setting exists whenever a reasonable person would believe he was not free to leave the presence of the police; and, that respondent was placed in that position because: 1) two armed officers were present in his house for the purpose of talking to him about a crime; 2) the deputy initiated the conversation with respondent; 3) the deputy intended to obtain evidence against him; 4) the questioning took place over a 20-30 minute period of time; and, 5) the prior relationship between the deputy and

respondent made the questioning subtly coercive. *People v. Cleburn*, 782 P.2d 784, 786-87 (Colo. 1989).

The Colorado Supreme Court also upheld the lower court's finding that the state failed to prove by clear and convincing evidence that respondent voluntarily consented to a search for and the seizure of the rifle. In support of its ruling, the Court cited, among other things, the subtly coercive effect arising from the relationship between the deputy and respondent. *Id.* at 786-87.

INTEREST OF AMICI CURIAE

The amici here have a substantial interest in seeing this holding reviewed because they all have law enforcement responsibilities within their respective jurisdictions. The holding of the Colorado court purports to construe the fourth, fifth, and fourteenth amendments to the United States Constitution, all of which are binding on the amici.

REASONS FOR GRANTING THE WRIT

I.

Pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), law enforcement officials may not subject citizens to custodial interrogation without having first advised them of certain rights protective of their fifth amendment privilege against self-incrimination. The *Miranda* Court noted, "By custodial interrogation, we mean questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprived of his freedom in any significant way." *Id.* at 444.

This Court had little trouble finding *Miranda* custody

present whenever police place a suspect under arrest for all practical purposes. *Orozco v. Texas*, 394 U.S. 324 (1969). However, it struggled for some time to determine whether any contact with police that was not intrusive enough to amount to an arrest could constitute custody for purposes of *Miranda*. In *Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect voluntarily appeared at police station for questioning) and *Beckwith v. United States*, 425 U.S. 341 (1976) (suspect who was the focus of IRS investigation interviewed in home in which he occasionally stayed), for example, this Court devoted its attention towards explaining why certain circumstances did not produce a custodial setting, rather than explaining what circumstances would.

The issue hinged on how broadly to apply *Miranda's* "deprived of ... freedom in any significant way" language. At least one justice believed it applied whenever a reasonable person in the suspect's position would have believed he was not free to leave the presence of the police. *Mathiason*, *supra* at 496 (Marshall, J., dissenting). The "not free to leave" standard would have made *Miranda* applicable whenever a person was subjected to a fourth amendment "seizure", *see United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J.)(seizure test); *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979 (1988) (same), regardless of the type of "seizure" (*i.e.*, investigatory detention or arrest, *see Terry v. Ohio*, 392 U.S. 1 (1968)) involved.

In 1983 and 1984, this Court decided a set of cases which, on their face, appeared to definitively answer the question. In *California v. Beheler* 463 U.S. 1121, 1125 (1983), this Court stated (with little discussion) that "the ultimate test {was} simply whether there {was} . . . 'restraint on freedom of movement' of the degree associated with a formal arrest." *See*

also Minnesota v. Murphy, 465 U.S. 420,430-31 (1984). Subsequently, the Court, in *Berkemer v. McCarty*, 468 U.S. 420 (1984), explained that the *Miranda* langua[illegible] would not be accorded talismanic power in and of itself, but would be applied only to address "those types of situations in which the concerns that powered the {*Miranda*} decision {were} implicated." *Id.* at 437. Those concerns, the Court said, were not implicated by brief *Terry*-type investigative detentions, but only where a person "was subjected to restraints comparable to to those associated with a formal arrest." *Id.* at 439-41. Since a person who has been subjected to restraints comparable to those associated with a formal arrest has, in fact, been arrested, regardless of any formal announcement, *see* 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, sec. 5.1(a) at 44 (1990 pocketpart), *Berkemer* equates *Miranda* "custody" with "arrest."

The *Berkemer* case involved questioning incidental to a routine traffic stop. Near the conclusion of its opinion there, this Court noted that "adherence to {the functional arrest} doctrine . . . will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody." *Id.* at 441. This has proven to be an understatement, at best.

Despite *Beheler* and *Berkemer*, a number of lower courts measure *Miranda* custody outside the context of traffic stops in terms of the "free to leave", "seizure" test, rather than in terms of a functional arrest test. *E.g. Cleburn*, 782 P.2d at 786-87; *State v. Fiocchi*, 17 Conn App. 326, 553 A.2d 181, 186-87 (Conn. App.) *petition for certification for appeal denied*, 210 Conn. 812, 556 A.2d 611 (1989); *Ruffin v. United States*, 524 A.2d 685 (D.C. App. 1987), *cert. denied* 108 S.Ct. 2827 (1988); *People v. Bernasco*, 185 Ill. App. 3d 480, 133 Ill. Dec. 563, 541

N.E.2d 774, 780-81 (1989); *Commonwealth v. Bryant*, 390 Mass. 729, 459 N.E.2d 792, 797-801 (1984); *State v. Allen*, 322 N.C. 176, 367 S.E. 2d 626 (1988); *State v. Hall*, 353 N.W.2d 37, 40-41 (S.D. 1984); *State v. Brunell*, 554 A.2d 242, 244 (Vt. 1988). Others hold that there are some "seizures" short of arrest which require compliance with *Miranda*. *E.g.*, *State v. Hall*, 537 So. 2d 171, 172 (Fla. App. 1989) (although "a temporary detention upon founded suspicion of criminal activity does not always require *Miranda* warnings," a more restrictive detention with more coercive circumstances than *Berkemer's*, establishes "custody"); *State, City of Spring Lake Park v. Seekon*, 392 N.W. 2d 624 (Minn. App. 1986) (*Miranda* warnings required in connection with "felony probable cause stops"); *State v. Connery*, 441 N.W. 2d 651, 654-55 (N.D. 1989) (finding "custody" where officer escalated detention beyond mere general investigation by drawing weapon to restrain individual). *See Blake v. State*, 763 P.2d 511, 515 (Alaska App. 1988) ("{A}n investigatory stop for purposes of the fourth amendment does not necessarily trigger a right to *Miranda* warnings."). Others still, however, specifically reject both the "seizure" test and the notion that any permissible investigatory detention could require *Miranda* warnings; these courts adhere strictly to the *Berkemer* functional arrest test. *E.g.*, *United States v. Streifel*, 781 F.2d 953, 960-61 (1st Cir. 1986); *State v. Toro*, 229 N.J. Super. 215, 551 A.2d 170, 172-73 (1988).

Whatever the test used, the lower courts have not employed a consistent approach in analyzing "custody." Some courts emphasize factors pertaining to the suspect's freedom of movement and the atmosphere surrounding police questioning. *E.g.*, *Streifel*, 781 F.2d at 961 n. 13. Others rely almost exclusively on the officers' and suspects' subjective intents or beliefs. *E.g.*, *Curtis v. State*, 754 S.W.2d 460, 463 (Tex. App.

1989). Many combine these approaches in some manner, *e.g.*, *McDowell v. Solem*, 447 N.W. 2d 646, 649 (S.D. 1989), and consider, among other things, whether the suspect was the focus of police investigation, *e.g.*, *McDowell*, 447 N.W. 2d at 649; *Jenkins v. State*, 533 So.2d 297, 300 (Fla. App. 1988) *petition for review denied* 542 So. 2d 1334 (Fla. 1989); *Commonwealth v. Smith*, 382 Pa. Super. 288, 555 A.2d 185, 190 (1989); *State v. Watkins*, 526 So. 2d 357, 360 (La. App. 1988); *Bosworth v. Commonwealth*, 7 Va. App. 567, 375 S.E. 2d 756, 759 (1989), whether the police had probable cause to arrest the suspect, *e.g.*, *Watkins*, 526 So. 2d at 360; 496 A.2d at 639; *McDowell*, 447 N.W. 2d at 649; *Bosworth*, 375 S.E. 2d at 759; *cf. Bernasco*, 541 N.E. 2d at 780 (extent of knowledge possessed by police), whether the police initiated contact with the suspect, *e.g.*, *Cleburn*, 782 P.2d at 786-87, and, the purpose of the police in questioning the suspect, *Cleburn*, 782 P.2d at 786-87; *Bernasco*, 541 N.E. 2d at 780; *McDowell*, 447 N.W. 2d at 649. [1]

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[1] There is no uniformity regarding the factors the lower courts consider. *See, e.g.*, *Streifel*, 781 F. 2d at 961 n. 13 (number of officers present; degree of physical restraint on accused; location, duration, and character of interview); *State v. Finch*, 518 So. 2d 864, 868-69 (Ala. App. 1987) (familiarity or neutrality of surroundings, number of police present, degree of physical restraint, duration and character of interrogation, how the suspect arrived at the scene of questioning, whether suspect is confronted with evidence of guilt, and degree of pressure applied to detain suspects); *People v. Thiret*, 685 P.2d 193, 203 (Colo. 1984) (time, place, and purpose of encounter; persons present during the interrogation; the words spoken by the officer to the suspect; the officer's tone of voice and

The problem lies with this Court's failure to explain in

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general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the suspect during questioning; the officer's response to any questions asked by the suspect; whether directives were given to the suspect during the interrogation; and, the suspect's verbal or nonverbal response to such directives); *Bernasco*, 541 N.E. 2d at 780-81 (location, time, length, mood, and motive of interview, including the extent of knowledge possessed by the police; the number of police present; the presence or absence of family or friends of the accused; the manner of accused's arrival at the place of interrogation; whether the accused voluntarily assisted in the investigation; whether the suspect was permitted to walk within and from the location of the interrogation unaccompanied by police; and the age, intelligence, and mental makeup of the accused); *People v. Arcese*, 148 App. Div. 2d 460, 538 N.Y.S. 2d 614, 615 *petition for review denied*, 74 N.Y.2d 661, 543 N.Y.S. 2d 403, 541 N.E. 2d 432 (1989) (amount of time spent with police; whether freedom of action restricted in any significant manner; location of and atmosphere under which accused was questioned; whether accused was apprised of his rights; and whether police questioning was investigatory or accusatory in nature); *McDowell*, 447 N.W. 2d at 649 (probable cause to arrest; focus of investigation; subjective perception of suspect; nature of interrogator; nature of suspect; time and place of interrogation; nature of interrogation; purpose of interrogation); *Curtis*, 754 S.W. 2d at 463 (whether the police had probable cause to arrest; whether the suspect was the focus of police investigation; the subjective intent of the police; and, the subjective belief of the suspect).

Berkemer what a functional arrest was other than to contrast it with the (repeatedly emphasized) brief and nonintrusive character of *Terry* "stops". *Berkemer*, 468 U.S. at at 439-42. Since *Berkemer*, this and other courts have acknowledged that investigatory detentions may be permissibly prolonged, *e.g.*, *United States v. Sharpe*, 470 U.S. 675 (1985) (30-40 minutes), and, in some circumstances, accompanied by the showing or even application of force, *e.g.*, *United States v. Hensley*, 469 U.S. 221, 224, 235 (1985) (drawn revolver); *United States v. Hastomorir*, 881 F.2d 1551, 1556-57 (11th Cir. 1989) (handcuffs); *see generally* 3 W. LaFave, *supra*, secs. 9.2(d) & (f) (1987 & 1990 Supp.), without becoming an arrest. Many lower courts, unsure of exactly how *Berkemer* would apply to these detentions, have opted to articulate *Miranda* custody in terms of the more general "seizure" standard; and, to consider prior police knowledge and motivation in determining the character of police-citizen contacts. *Cf. Jenkins*, 533 So. 2d at 300 (*Miranda* warnings required where officer created relaxed and informal setting calculated to delude prime suspect of the purpose for questioning him).

In the process, these courts have failed to recognize that: 1) absent intimidating circumstances, police questioning does not, in and of itself, amount to any type of "seizure," *I.N.S. v. Delgado*, 466 U.S. 210 (1984); *Royer*, 460 U.S. at 497-98, 501; 2) subjective factors regarding whether the suspect was the focus of investigation, whether the police had probable cause to arrest the suspect, for what purpose the police initiated contact with the suspect, and the undisclosed intent of the officer, logically have nothing to do with the objective determination of what a reasonable person in the suspect's position would believe, *e.g.*, *United States v. Bengivenga*, 845 F.2d 593, 596-97 (5th Cir.) *cert. denied* 109 S.Ct. 306 (1988)

(citing, among others, *Berkemer*, *supra*; *Beckwith*, *supra*; *Murphy*, *supra*); *Allen*, 367 S.E. 2d at 632; and, 3) *Miranda* was designed to protect suspects from inherently coercive, police-dominated settings which work to undermine the individual's will to resist and compel him to speak where he would otherwise not freely do so -- settings laced with insinuations that questioning will continue until confessions are obtained. *Miranda*, 384 U.S. at 467-68; *Murphy*, 465 U.S. at 433; *Fiocchi*, 553 A. 2d at 186.

Perhaps nowhere is the confusion regarding *Miranda* custody more evident than in the Colorado Supreme Court's *Cleburn* opinion. First, the Colorado court inexplicably mixed interrogation (questioning designed to obtain incriminating evidence, *see Rhode Island v. Innis*, 446 U.S. 291 (1980) up with custody. *see Murphy*, *supra* at 431; *United States v. Phillips*, 812 F.2d 1355, 1360-61 (11th Cir. 1987); *United States v. Hall*, 421 F.2d 540, 544 (2d Cir. 1969) *cert. denied* 397 U.S. 990 (1970); *Fiocchi*, 553 A. 2d at 187. Next, it improperly applied subjective factors regarding police knowledge and motive to the objective, reasonable person standard which governs here. *Berkemer*, 468 U.S. at 442; *Bengivenga*, 845 F. 2d at 596-97; *Phillips*, 812 F.2d at 1361-62. Third, it unduly distorted the relative importance of the presence of armed officers, *see United States v. Chalan*, 812 F.2d 1302, 1305-07 (10th Cir. 1987); *cf. State v. Craney*, 381 A.2d 630, 632 (Me. 1978) (pyschological pressures emanating from officers' authority alone is insufficient to create an inherently coercive environment), police initiation of conversation, *e.g. Terry*, 392 U.S. at 32 (Harlan, J., concurring: a police officer has the same liberty possessed by every other citizen to address questions to other people); *Royer*, 460 U.S. at 497-98, 501 (same), and length of interrogation. *See e.g.*, *Chalan*, *supra* at 1306-07 (90

minutes); *State v. Carpentier*, 562 A.2d 181, 182-83 (N.H. 1989) (3 hours); *People v. Stebbins*, 543 N.Y.S. 2d 598, 599 (N.Y. App. 1989) (2 hours); *United States v. Hall*, 421 F.2d at 543 (17 minutes). Fourth, it erroneously attributed an inherently coercive effect to respondent's mere acquaintanceship with the deputy. *See Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("Fifth Amendment protections are not concerned with moral or pyschological pressures to confess emanating from sources other than official coercion"); *see also Mitchell v. State*, 541 N.E. 2d 265, 269 (Ind. 1989) (suspect's close personal relationships with officers made him less susceptible to official pressure); *Commonwealth v. Willman*, 434 Pa. 489, 255 A.2d 534, 536 (1969) ("by being friendly, the police alleviated the danger of intimidating appellant into making a confession").

All these matters became particularly significant when the court felt compelled to measure *Miranda* custody in terms of a test significantly more favorable to the accused than that which this Court applied in *Beheler* and *Berkemer*. *See Streifel*, 781 F. 2d at 960-61. The application of the *Berkemer* functional arrest test would not have allowed the Colorado court to wholly ignore respondent's having been questioned in his home, in the presence of his wife, by an individual he knew, without any restraint on his physical movement, and without any deception or application of physical force. "Questioning an individual in his own home, without more, is not sufficient to conclude that the interrogation was custodial. . . . There were, in this case, no additional significant circumstances upon which to predicate a finding of custodial interrogation". *People v. Benz*, 136 App. Div. 2d 958, 524 N.Y.S. 2d 942, 943, *petition for review denied*, 72 N.Y. 2d 856, 532 N.Y.S. 2d 506, 528 N.E.2d 896 (1988). *See also, United States v. Hall*, 421 F.2d at 544 (more than polite interrogation is required to established

custody).[2]

In 1986 then Chief Justice Burger remarked on "the acute need" for further clarification of the *Miranda* custody standard. *Maine v. Thibodeau*, 475 U.S. 1144, 1145 (1986) (Burger, C.J., dissenting from denial of certiorari). As this Colorado case demonstrates, that need has only been exacerbated, not subsided, since that time. It has been over 23 years since *Miranda* was decided, and 5 years since *Berkemer* was decided. Yet, "the precise contours of applicable constitutional standards remain less than clear." *Streifel*, 781 F.2d at 961 n. 14.

Miranda continues "to exact heavy costs on the public's interest in protection from crime." Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U.Chi. L. Rev. 938, 948-49 (1987). The states, in particular, did not willingly assume those costs;

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[2] *See also, e.g., Beckwith*, 425 U.S. at 342-48 (2 IRS agents interviewed suspect in a home in which he occasionally stayed); *United States v. Hall*, 421 F.2d at 542-46 (3 FBI agents interviewed suspect in his own apartment); *Phillips*, 812 F.2d at 1360-62 (suspect questioned in his shop by two officers, one of whom suspect saw on a daily basis); *United States v. Bush*, 820 F.2d 858, 859, 862 (7th Cir. 1987) (FBI agent interviewed suspect in his own home); *Erhart v. State*, 656 P.2d 1199, 1200 n. 1 (Alaska App. 1982) (suspect interviewed in his own home and in the presence of his family); *State v. Davis*, 446 N.W. 2d 785, 786 (Iowa 1989) (suspect interrogated in "most pleasant" atmosphere in his own home); *State v. Coburn*, 221 N.J. Super. 586, 535 A.2d 531, 536-37 (1987) *cert. denied* 110 N.J. 300, 540 A.2d 1281 (1988) (interrogation in home of suspect's ex-wife, in the presence of suspect's sister and the sister's friend).

but had those costs imposed upon them as a result of this Court's interpretation of the federal constitution. As *Cleburn* and other similar cases show, courts and law enforcement officials are struggling to predict the point at which this Court will require the payment of *Miranda's* societal costs. Meanwhile, *Miranda* has been turned topsy-turvy: probative evidence is excluded now even where police act towards persons in such a considerate manner that they dispel any notion of coercion on their part. *See also Jenkins*, 533 So. 2d at 300 (*Miranda* warnings required where police created a relaxed and informal atmosphere of interrogation).

Definitive guidance is needed regarding what type of "seizure" is necessary to trigger *Miranda* protections, and how to determine whether the appropriate level of seizure has been effectuated. When states exclude probative evidence based on the type of reasoning employed here, the public justifiably perceives *Miranda* as promoting a sense of gamesmanship at the expense of respect for, and the protection of, the law. *Cf.* Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417, 1419, 1450, 1457 (1985). This case provides the Court with an opportune vehicle to re-harmonize *Miranda* custody with the purposes it was originally meant to achieve.

II.

Since *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), it has been clear that voluntariness of consent to search determinations closely parallel voluntariness of statement determinations. Significant differences have developed, however, regarding the analysis applied for determining fourteenth amendment voluntariness in each of the two instances.

The Colorado court held that one of the factors

contributing to the involuntariness of respondent's consent to search was the coercive effect of the relationship between respondent and the deputy. In *Connelly*, 479 U.S. at 167, this Court held that a person's state of mind was irrelevant to a voluntariness of statement inquiry unless and until the police engaged in some type of coercive activity. The Court refused to "expand {the} line of 'voluntariness cases' into a far-ranging requirement that courts must divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision." *Id.* at 165-66. Whatever pyschological pressures respondent may have felt as a result of his acquaintanceship with the deputy, they could have had no bearing on the voluntariness inquiry in the absence of "police overreaching," "coercive police conduct," "police wrongdoing," or "objectively unacceptable police behavior." *Id.* at 163-65; *United States v. Wolf*, 813 F.2d 970, 975-76 n. 16 (9th Cir. 1987). *Cf. McCall v. Dutton*, 863 F.2d 454, 461 (6th Cir. 1988) *cert denied* 109 S.Ct. 1744 (1989) ("if {a} confession was the product of {one's} own incoherent mind, rather than a product of police coercion, the confession should not be suppressed"). There never was, nor could there be, a claim of police overreaching in this case--the deputy was at all times straightforward with respondent, and never intimated that he would help respondent in exchange for his cooperation.

A second, and perhaps even more glaring, inconsistency in the voluntariness inquiries is evident here. Since *Lego v. Twomey*, 404 U.S. 477 (1972), the voluntariness of statements has had to be shown by a preponderance of the evidence. Many lower courts have adopted that same burden of proof with respect to the voluntariness of consents to search. *E.g., People v. Bruce*, 185 Ill. App. 356, 133 Ill. Dec. 497, 541 N.E.2d

708, 715 (1989); *State v. Lamp*, 322 N.W. 2d 48, 53 (Iowa 1982); *State v. Ruden*, 245 Kan. 95, 774 P.2d 972, 979 (1989); *State v. McLain*, 367 A.2d 213, 217 (Me. 1976); *Humphrey v. State*, 39 Md. App. 484, 386 A.2d 1238, 1242 (1978); *State v. Peterson*, 525 S.W. 2d 599, 608 (Mo. App. 1975); *Wilde v. State*, 706 P.2d 251, 256 (Wyo. 1985).

Like Colorado, however, many other courts believe that the federal constitution requires that voluntariness of consents to search be shown by clear and convincing evidence. *E.g*, *United States v. Andrews*, 746 F.2d 247, 249 (5th Cir. 1984) *cert. denied* 471 U.S. 1021 (1985); *Lott v. State*, 456 So. 2d 857, 859 (Ala. Ct. App. 1984); *Restrepo v. State*, 438 So. 2d 76, 77 (Fla. App. 1983); *State v. Harwood*, 94 Idaho 615, 495 P.2d 160, 163 (1972); *State v. Cantanese*, 493 So. 2d 725, 728 (La. App. 1986); *State v. Valencia-Olaya*, 105 N.M. 690, 736 P.2d 495, 499 (1987); *State v. Phillips*, 25 N.C. App. 5, 212 S.E. 2d 172, 175 (1975); *Coon v. State*, 587 P.2d 1373, 1374 (Okla. Ct. App. 1978); *State v. Glenn*, 83 Or. App. 650, 732 P.2d 946, 948 (1987); *Linnell v. State*, 767 S.W.2d 925, 927 (Tex. App. 1989); *State v. Mathe*, 35 Wash. App. 572, 668 P.2d 599, 602 (1983) *aff'd* 102 Wash. 2d 859, 688 P.2d 859 (1984). *See Huls v. State*, 27 Ark. App. 242, 770 S.W. 2d 160, 164 (1989) (clear and positive evidence).

Recently, this Court refused to require such an exacting standard even when establishing the voluntary, knowing, and intelligent waiver of fifth amendment *Miranda* rights. *Connelly*, 479 U.S. at 168-69. In *Connelly*, the Court reiterated the *Lego* policy considerations: the absence of evidence indicating that federal rights suffer from the application of a preponderance standard; and, the improbability that escalating the state's burden of proof would sufficiently deter lawless police conduct so as to outweigh the public's interest in placing probative

evidence before juries.

No special policy considerations distinguish the *Lego-Connelly* situations from the context of determining the voluntariness of consents to search. The various jurisdictions should no longer labor under the impression that a different burden applies. Its harmful effect is plainly visible in a case where, as here, individuals have been informed of a right to refuse consent but courts nonetheless refrain from finding valid consent because of a particular caution with which they apply the clear and convincing evidence standard.

Whether the same, similar, or different analyses apply to determine admissibility of evidence supposedly taken in derogation of the fourth, fifth, and fourteenth amendments, is a matter of grave importance to each of the amici.

CONCLUSION

For the foregoing reasons the *amici curiae* respectfully request that this Court issue a writ of certiorari to review the Colorado Supreme Court decision in *People v. Cleburn*.

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